ISMAIL ABDUL HAMID

v.

OSK & PARTNERS SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
N.H. CHAN JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: W-04-81-96]
16 DECEMBER 1996

CIVIL PROCEDURE: *Appeal - Appeals to High Court from subordinate Courts - Notice of appeal - Whether notice must be filed at Registry of High Court - Whether filing of notice in subordinate Court proper - Subordinate Courts Rules 1980, O. 49 r. 6(2) - Form 140.*

The instant appeal concerned a procedural point of law which rested upon the proper construction of O. 49 r. 6(2) of the Subordinate Courts Rules 1980 ('the SCR'). The appellant against whom a summary judgment was entered in the Sessions Court under O. 26A of the SCR had appealed to the High Court against the said judgment. He filed his notice of appeal in the Sessions Court. In the result, the High Court held that the appeal was out of order as the appellant's notice of appeal was filed in the Sessions Court instead of the Registry of the High Court as it should have been. The appellant appealed to the instant Court against the said ruling of the High Court.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] The phrase "to the Registrar of the High Court" appearing in O. 49 r. 6(2) of the SCR, in its proper context, refers to the time limit within which a notice of appeal is to be served on a respondent. It is not to be read as requiring an appellant to lodge his notice of appeal with the Registrar of the High Court.

[2] The normal rule of practice and procedure is that a notice of appeal is to be filed at the registry of the Court against whose decision an appeal is being preferred. The purpose is to draw to the attention of the deciding Court the fact that its order is being challenged at the appellate level so that the judicial arbiter may produce written reasons for his decision.

[3] No useful purpose will be served by the notice of appeal being lodged with the appellate Court. There is no machinery for the appellate Court to receive and deal with a notice of appeal against the decision of a lower

Court. Also, there will be no notification whatsoever by the dissatisfied party to the subordinate Court that its decision is being questioned on appeal. Once the notice of appeal is filed in the registry of the subordinate Court, there is no harm in the appellant furnishing the High Court with a copy of the notice of appeal to keep it informed.

[4] Consequently, O. 49 r. 6(2) of the SCR does not require an unsuccessful litigant to lodge his notice of appeal with the Registrar of the High Court; it is sufficient that he files the notice with the Registrar of the subordinate Court.

[5] In respect of like appeals which have been dismissed *in limine*, the ends of justice will be best served in such cases by the appropriate Courts entertaining applications to set aside the earlier dismissals and to have the appeals restored. In cases where the notice of appeal has already been filed erroneously in the High Court, that Court should treat the non-observance of the rule as an irregularity and proceed to hear and dispose such appeals on the merits.

Held:

Per Abu Mansor Ali JCA (delivering the judgment of the Court):

[1] Even if there is a confusion in regard to the phrase "to the Registrar of the High Court" appearing in O. 49 r. 6(2) of the SCR, it can be easily resolved by referring and adhering to Form 140 of the SCR. Having regard to the wordings of Form 140 of the SCR, it is clear and unambiguous that a notice of appeal has to be sent within 14 days "To The Registrar, Sessions Court at ..." or "The Magistrate at ..." .

[Appeal allowed, ruling of High Court reversed, and appellant's appeal restored with direction that it be heard on its merits in the High Court]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Rayuan - Rayuan kepada Mahkamah Tinggi daripada Mahkamah Rendah - Notis Rayuan - Samada notis harus difailkan di Pejabat Pendaftar Mahkamah Tinggi - Samada pemfailan notis dalam Mahkamah Rendah wajar - Kaedah-kaedah Mahkamah Rendah 1980, A. 49 k. 6(2) - Borang 140.*

Rayuan semasa adalah berkaitan prosedur perkara undang-undang yang mana terletak di atas pembentukan wajar A. 49 k. 6(2) Kaedah-kaedah Mahkamah Rendah 1980 ('KMR tersebut'). Perayu terhadap mana satu penghakiman terus telah dimasuki dalam Mahkamah Sesyen di bawah A. 26A KMR tersebut telah merayu kepada Mahkamah Tinggi terhadap penghakiman tersebut. Beliau telah

memfailkan notis rayuannya dalam Mahkamah Sesyen. Hasilnya, Mahkamah Tinggi telah memutuskan bahawa rayuan itu adalah di luar aturan kerana notis rayuan perayu telah difailkan dalam Mahkamah Sesyen dan bukannya Pejabat Pendaftaran Mahkamah Tinggi sepertimana ianya sepatutnya dilakukan. Perayu telah merayu kepada Mahkamah semasa terhadap keputusan Mahkamah Tinggi itu.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Ungkapan "to the Registrar of the High Court" yang terdapat dalam A. 49 k. 6(2) KMR, dalam konteksnya yang wajar, merujuk kepada had masa dalam mana sesuatu notis rayuan hendaklah disampaikan ke atas responden. Ianya tidak seharusnya dibaca sebagai menghendaki perayu membuat notis rayuannya dengan Pendaftar Mahkamah Tinggi.

[2] Kaedah biasa amalan dan prosedur adalah bahawa sesuatu notis rayuan hendaklah difailkan di pejabat pendaftaran Mahkamah terhadap keputusan yang mana suatu rayuan adalah diutamakan. Tujuannya adalah untuk menarik perhatian Mahkamah yang membuat keputusan, hakikat bahawa perintahnya sedang dicabar di peringkat rayuan supaya aribiter kehakiman boleh mengemukakan alasan-alasan bertulis bagi keputusannya.

[3] Dengan membuat notis rayuan di Mahkamah Rayuan, ianya tidak akan membawa apa-apa tujuan yang berguna Mahkamah Rayuan tidak boleh menerima dan berurusan dengan sesuatu notis rayuan terhadap keputusan sebuah Mahkamah rendah. Juga, tidak terdapat apa-apa pemberitahuan oleh pihak yang tidak berpuashati kepada Mahkamah rendah bahawa keputusannya sedang dipersoalkan atas rayuan. Sebaik sahaja notis rayuan difailkan di pejabat pendaftaran Mahkamah rendah, tidak menjadi masalah bagi perayu mengemukakan kepada Mahkamah Tinggi satu salinan notis rayuan itu untuk maklumannya.

[4] Berikutan itu, A. 49 k. 6(2) KMR tidak menghendaki litigan yang tidak berjaya untuk membuat notis rayuannya dengan Pendaftar, Mahkamah Tinggi, ianya memadai bahawa beliau hanya memfailkan notis itu dengan Pendaftar Mahkamah rendah.

[5] Berhubung dengan rayuan-rayuan yang sedemikian yang telah ditolak *in limine*, keputusan keadilan akan sebaiknya diberikan dalam kes-kes yang sedemikian oleh Mahkamah-Mahkamah sewajarnya yang mengendalikan permohonan-permohonan untuk mengenepikan penolakan-penolakan yang lebih awal dan mengembalikan semula rayuan itu. Dalam kes-kes di mana notis rayuan telah secara salahnya difailkan dalam Mahkamah Tinggi,

Mahkamah itu seharusnya menganggapkan ketidakpatuhan akan kaedah itu sebagai suatu luar aturan dan terus mendengar dan melupuskan rayuan-rayuan yang sedemikian berdasarkan merit-merit.

Diputuskan:

Oleh Abu Mansor Ali HMR (menyampaikan penghakiman Mahkamah):

[1] Walaupun jika terdapat kekeliruan berhubung dengan ungkapan "to the Registrar of the High Court" yang kelihatan dalam A. 49 k. 6(2) KMR, ianya dengan mudah boleh diselesaikan dengan merujuk dan mematuhi Borang 140 KMR. Memandangkan perkataan-perkataan Borang 140 KMR itu, ianya jelas bahawa satu notis rayuan haruslah dihantar dalam tempoh 14 hari "To the Registrar, Sessions Court at ... atau "The Magistrate at ..."

[Rayuan dibenarkan, keputusan Mahkamah Tinggi diakas, dan rayuan perayu dipulihkan kembali dengan arahan bahawa ianya didengar berdasarkan merit-meritnya dalam Mahkamah Tinggi].

Cases referred to:
Pandan Maju Sdn. Bhd. v. Dulon Industries Sendirian Berhad [1996] 3 AMR 3151
Tan Wee Choon v. Tan Kee Kiat (M) Sdn. Bhd. (High Court Civil Appeal No: 12-22-95-Unreported)
Datuk Bandar Kuala Lumpur v. Seman bin Amat [1996] 3 CLJ 263
Sim Seoh Beng v. Koperasi Tunas Muda Sungei Ara Bhd. [1995] 1 CLJ 491

Legislation referred to:
Subordinate Courts Rules 1980, O. 26A, O. 49 r. 6(2)

[Appeal from High Court Malaya, Kuala Lumpur; Civil Appeal No: R3-12-283-95]

For the appellant - B. Thangaraj; M/s. Thangaraj & Assoc.
For the respondent - Isa Aziz Ibrahim; M/s. Cheang & Ariff

JUDGMENT

Gopal Sri Ram JCA:

This appeal concerns a short but important point of procedure upon which there is a marked divergence of opinion between High Courts. It has to do with the proper construction that is to be placed on O. 49 r. 6(2) of the Subordinate Courts Rules 1980 ('the Rules'). Some Judges have expressed the view that a party who is dissatisfied with the decision of a subordinate Court should file his notice of appeal in the Registry of that Court. Others have taken the

position that the notice should be filed in the Registry of the High Court. This difference in opinion between Judges of the High Court has resulted in uncertainty in the procedure that is to be adopted.

The present appeal is one such case. The High Court in the instant appeal held the appeal to be out of order because the appellant, against whom summary judgment pursuant to O. 26A of the Rules had been entered, had filed his notice in the Sessions Court. The appellant has appealed against this ruling of the Judge. At the hearing, Counsel said that this is the first time this Court has been called upon to resolve the controversy.

Rule 6(2) of O. 49 which is at the root of the problem reads as follows:

> The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.

The difference of opinion of which I spoke a moment ago arises from the reference in r. 6(2) to "the Registrar of the High Court". But what the rule does in that context is to limit the time within which the notice of appeal is to be served on a respondent. It is not to be read – and this is how the learned Judge here read it – as requiring an appellant to lodge his notice of appeal with the Registrar of the High Court.

The normal rule of practice and procedure is that a notice of appeal is to be filed at the Registry of the Court against whose decision an appeal is being preferred. The purpose is to draw to the attention of the deciding Court the fact that its order is being challenged at the appellate level so that the judicial arbiter, be it Magistrate or Sessions Judge, may produce written reasons for the decision appealed against. On the other hand, no useful purpose will be served by the notice being lodged with the appellate Court. In the first place there is no machinery for that Court to receive and deal with a notice of appeal against the decision of a lower Court. Secondly, there will be no notification whatsoever by the dissatisfied party to the subordinate Court that its decision is being questioned on appeal. Once the notice of appeal is filed in the Registry of the subordinate Court, there is no harm in the appellant furnishing the High Court with a copy of the notice of appeal to keep it informed.

It is undoubtedly within the powers of the Rules Committee to alter the normal practice by making a rule of Court to that effect. However, it will require clear and compelling language for such a consequence to ensue. In my judgment, the language in which r. 6(2) is couched does not have the far-

reaching effect of reversing the well-established practice earlier referred to.

I am therefore of opinion that the rule does not require an unsuccessful litigant to lodge his notice of appeal with the Registrar of the High Court. It is sufficient that he files the notice with the Registrar of the subordinate Court.

The judgment of Low Hop Bing J in *Pandan Maju Sdn. Bhd. v. Dulon Industries Sendirian Berhad* [1996] 3 AMR 3151 and that of Augustine Paul JC in *Tan Wee Choon v. Tan Kee Kiat (M) Sdn. Bhd.,* (Melaka High Court Civil Appeal No. 12-22-95, as yet unreported) accord with the views I adhere to and must be treated as correctly stating the law. On the other hand, *Datuk Bandar Kuala Lumpur v. Seman bin Amat* [1996] 3 CLJ 263 and all decisions to like effect are not good law and should not be followed. For completeness they should be overruled.

I am conscious of the injustice that may have been visited upon litigants by reason of the difference in judicial opinion in that appeals have been dismissed *in limine*. The ends of justice will be best served in such cases by the appropriate Courts entertaining applications to set aside the earlier dismissal and to have the appeals restored to the list. In cases where the notice of appeal has already been filed erroneously in the High Court, that Court should treat the non-observance of the rule as an irregularity and proceed to hear and dispose such appeals on merits in order to ensure that substantial justice is done. I would, in this context, recall to mind that, "a rule of Court should not be given an interpretation that would result in unfairness or produce a manifest injustice": *Sim Seoh Beng & Anor. v. Koperasi Tunas Muda Sungei Ara Bhd.* [1995] 1 CLJ 491 at p. 495; [1995] 1 MLJ 292 at p. 296.

Turning to the present case, I must say at once that Encik Isa Aziz Ibrahim of Counsel for the respondent before us, having heard our preliminary views on the appeal, readily conceded that the appeal had merits. This Court expresses its appreciation to Counsel for his forthrightness.

Having come to the conclusion that the notice of appeal was correctly filed and that the appeal was therefore properly brought to the High Court, the appeal to this Court was allowed, the learned Judge was reversed and his order set aside. The matter was restored to the list of appeals with a direction that the appeal before the High Court be heard on its merits.

Encik Thangaraj very properly did not move for costs. It was therefore directed that there be no order as to costs and that the deposit paid by the appellant be refunded to him.

N.H. Chan JCA:

I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA in draft with which I agree.

Abu Mansor Ali JCA:

I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA with which I am in complete agreement except to add that even if there exists an apparent confusion in the words of r. 6(2) – "to the Registrar of the High Court" – if it can be called confusion – it can easily be resolved by referring and adhering to Form 140, for an appellant is statutorily required to file his notice of appeal within 14 days "in Form 140" which reads as follows:

Form 140
Notice of Appeal
(Heading)

Take notice that ... being dissatisfied with the decision of the Sessions/ Magistrates' Court at ... given on the ... day of ... , 19 ... , appeals to the High Court against either/or the whole of the said decision such part of the said decision as decides that

(set out details)

Dated the ... day of ... 19 ...

...
appellant
solicitor for the appellant

To
The Registrar, Sessions Court at ... .
The Magistrate at ...

What cannot escape our notice and I think is free of any ambiguity is that the notice of appeal has to be sent within 14 days:

To the Registrar, Sessions Court at .../The Magistrate at ...

As stated above, I agree with the judgment of my learned brother and associate myself with the sentiment and directions already expressed. I agree with him that this appeal be allowed and the learned Judge's order be reversed as ordered.

Reported by Gan Peng Chiang